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No. 99-298

In The

SUPREME COURT OF THE UNITED STATES

JEFF BRYANT,

Petitioner,

v.

GOLDEN FLAKE SNACK FOODS, INC. and LIBERTY MUTUAL INSURANCE CO.,

Respondents.

and

WILLIAM GUNTER,

Petitioner,

v.

CITY OF BELLEVIEW and FLORIDA LEAGUE OF CITIES,

Respondents.

On Petition For Writ of Certiorari To
The District Court Of Appeal, First District,
State of Florida

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counsel of Record:
DOUGLAS W. ABRUZZO
POST OFFICE BOX 714
GAINESVILLE, FLORIDA
32602
(352) 371-9691

MICHAEL B. STALEY
POST OFFICE BOX 4163
OCALA, FLORIDA
34478
(352) 694-5297

1328

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Petitioner Bryant's REPLY TO BRIEF IN OPPOSITION:

I. The Federal Rights Raised Here Are Intertwined With and Identical To State Rights Raised Below.

Respondents GOLDEN FLAKE SNACK FOODS, INC. and LIBERTY MUTUAL INSURANCE COMPANY argue that the federal rights sought to be enforced herein were not addressed by or presented to the state court. (Respondents' Brief at 3). They cite Adams v. Robertson, 117 S.Ct 1028 (1997) for the proposition that this Court will assume the federal issues were not properly presented below if the state court does not address the federal issues. (Respondents' Brief at 4). There then appears to be a conflict in this Court's prior cases. For in Michigan v. Long, 463 U.S. 1032 (1983) this Court stated that when the state and federal law is interwoven, and the face of the state court opinion does not show an independent and adequate state law ground for the decision, this Court will assume the state court felt required to comply with federal law. Id., 1040-1041.

Michigan v. Long was quoted more recently in Ohio v. Robinette, ___U.S.___, 117 S.Ct. 417 (1996). There are also other recent cases holding that when the state constitutional rights are identical to federal constitutional rights, review under 28 U.S.C. § 1257 is proper unless the state court opinion sets out an independent and adequate state law ground for the decision. (Petition at 16-17).

Respondents graciously acknowledged the state and federal constitutional rights are similar. (Respondents' Brief at 4). A close examination reveals they are legally indistinguishable. They are so intertwined that the state court decision would be res judicata to petitioners' federal rights. (Petition at 14-15). It is difficult to reconcile how the state and federal issues may be so intertwined as to constitute res judicata, yet not be sufficiently

intertwined to authorize federal review.

II. The Restriction of Medical Evidence Violates Federal Rights.

A. Due Process of Law...

Respondents argue that due process concerns are less critical in an "administrative setting" than in court. (Respondents' Brief at 7). Yet, they also argue that workers compensation statutes are a substitute remedy for the injured workers' common law tort rights; under the theory that eliminating common law rights is justified by providing a "more certain" administrative remedy. (Respondents' Brief at 9.) However, the very issue raised here is whether the availability of medical testimony is more restricted in the administrative setting than it would be in a court of law. Is it a due process "double whammy?"

B. Redress of Grievances...

Respondents argue that since the workers compensation law does not eliminate the cause of action entirely, it does not run afoul of federal "redress" rights. (Respondents' Brief at 9-10). The very issue raised here is whether the availability of medical testimony is so much under the insurance company's control as to essentially eliminate the very means by which the injured party may petition for relief from the insurance company's decisions about his medical treatment. Has the State of Florida created too steep a tilt in the playing field?

C. Equal Protection of The Laws...

Respondents incorrectly argue that review of these fundamental rights under the equal protection clause should be by the "rational basis" test, rather than the "strict scrutiny" test. (Respondents' Brief at 10-11). They also argue that as long as the entire class of litigants (injured workers) are treated similarly, there is no equal protection problem.

(Respondents' Brief at 10). This once again avoids the real issue. Petitioners do not argue that provision of an administrative remedy for a common law tort right is inherently violative of equal protection principles. The issue raised here is, having selected out a class of litigation to be handled in a separate administrative forum (depriving that class of litigants of access to the court system), is it then permissible to make the admissibility of evidence more restrictive than in the court system (depriving that class of litigants of evidence which would have been available if they had not been deprived of their access to court)? It is doubtful such a statute could survive even under the more relaxed "rational basis" test.

III. Vulnerability Of The Administrative Judges Deprives Parties Of An Independent Adjudicator.

Respondents appear to resort to some sort of "standing" argument by asserting a lack of "...specific proof..." that a particular JCC has lost impartially, and attacking an "...unproven assumption..." that a particular governor is aligned with insurance companies against injured workers. (Respondents' Brief at 13). Of course, the real issue raised here is whether the statute provides the structure for depriving an entire class of litigants of an impartial magistrate, not whether this particular litigant can prove it actually happened to him. See, Petition at i, Questions Presented For Review, paragraph 2.

IV. Petitioner Has Standing To Contest An Illusory Substitute Remedy.

Respondents again appear to resort to attacking petitioner's standing to raise the issue of the illusory remedy by arguing such claims are not ripe. (Respondents' Brief at 14). This argument rests on the concept that petitioner was denied any benefits whatsoever by the JCC, so he lacks standing to raise how such benefits might be calculated. (Respondents'

Brief at 14-15). Of course, respondents do neglect that petitioner has also challenged the very means by which he was denied benefits, en route to his claim the workers compensation system as a whole has become an illusory remedy. (Petition at 7).

Nonetheless, Respondents then proceed with argument which correctly belongs in a brief on the merits, that petitioner's challenge is "unsound" because the Florida Legislature made findings that the insurance industry was in "financial crisis" due to Florida's Workers Compensation system. (Respondents' Brief at 15). In an abundance of caution, petitioner will address this argument, to demonstrate that the findings by the Florida Legislature are hardly dispositive of the issues presented for possible review by this Court.

In NAACP v. Button, 371 U.S. 415 (1963), the state courts made findings that permitting attorneys to address public gatherings for the purpose of informing the general public about their legal rights presented a serious danger of allowing "attorney solicitation," a grievous evil, harmful to the state's citizens. Yet, this Court, looking with a broader perspective, determined that the danger of infringing on First Amendment guarantees outweighed the evil identified in the findings by the state.

In the instant case, the issue is whether this Court should review whether the substitute remedy found appropriate under state law runs afoul of similar federal rights.

Petitioner Gunter's REPLY TO BRIEF IN OPPOSITION:

I. Respondents' Restatement Of The Questions For Review Is Incorrect.

Respondents CITY OF BELLEVIEW, FLORIDA, and FLORIDA LEAGUE OF CITIES listed in their brief "Questions Presented For Review (Restated)." (Respondents' Brief at i). To be sure, the issues listed by respondents do not match the questions presented by petitioner. (Petition at i). Although Respondents may find it advantageous to answer questions they prefer - rather than questions posed by the petitioner - it does not appear Rule 15 of this Court authorizes such a "restatement" of the issues presented.

In one instance, the "restated" question actually changes the constitutional provision against which petitioners requested the Court to measure the state law. Respondents list one of the questions presented as:

> II. WHETHER § 440.45(2), FLA.STAT.(1994) IS AN UNCONSTITUTIONAL VIOLATION OF SEPARATION OF POWERS?

(Respondents' Brief at i). However, petitioner actually presented the question as:

> 2. Whether the unfettered discretion of the Governor to appoint and dismiss administrative judges under Florida's Workers Compensation Law denies the injured worker an independent adjudicator in violation of The due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution and the redress of grievances clause of the First Amendment to the U.S. Constitution?

(Petition at i). A review of respondents' argument on Question 2 reveals that it indeed focuses on separation of powers and not due process, nor equal protection nor redress of grievances. (Respondents' Brief at 7-8.

Accordingly, because respondents failed to address the question actually presented, petitioner prays the Court to strike or ignore all of the argument presented by respondents regarding that "restated" issue.

II. Respondents' Challenge to Federal Jurisdiction Is Inapposite.

Respondents challenge the basis of this Court's jurisdiction under 28 U.S.C. § 1257. (Respondents' Brief at 1). They first assert that the Florida Supreme Court would have jurisdiction (hence Florida's First District Court of Appeal is not the highest state court in which a decision could be had), then assert that the First District Court of Appeal issued no written opinion (hence there is no "decision" for this Court to review). (Respondents' Brief at 1.)

The argument that the Florida Supreme Court would have jurisdiction is rather bizarre. Respondents cite to the Florida Rules of Civil Procedure, rules promulgated by the Florida Supreme Court itself, as the source of its own jurisdiction. (Respondents' Brief at 1.) Of course, the basis of jurisdiction for all Florida Courts is the Florida Constitution.

> The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts. No other courts may be established by the state, any political subdivision or any municipality. Article V, § 1, Florida Constitution.

The Florida Constitution does give the Florida Supreme Court jurisdiction to issue Prohibition and "all writs." Article V, § 3(b)(7), Florida Constitution. However, this argument is inapposite, as the writ of prohibition serves only to prohibit a lower court from exceeding its lawful jurisdiction (Lamounette v. Akins, 547 So.2d 1001(Fla. 1st DCA 1989)) and the all writs jurisdiction applies only when the Florida

Supreme Court would otherwise have independent jurisdiction under other authority. See, Florida Senate v. Graham, 412 So.2d 360, 361 (Fla. 1982). Neither would confer jurisdiction to review this case on the Florida Supreme Court.

Further, respondents argue that this Court lacks jurisdiction because there was no written "opinion" by the First District Court of Appeal. (Respondents' Brief at 1). Ironically, this contradicts their argument regarding Florida Supreme Court jurisdiction, inasmuch as the Florida Supreme Court has held that it lacks jurisdiction to review a decision without a written opinion.

> This Court does not, however, have subject-matter jurisdiction over a district court opinion that fails to expressly address a question of law, such as opinions issued without opinion or citation. Thus, a district court decision rendered without opinion or citation constitutes a decision from the highest state court empowered to hear the case, and appeal may be taken directly to the United States Supreme Court. (Emphasis added.) The Florida Star v. B.J.F., 530 So.2d 286, 288 n.3 (1988).

Respondents have cited no authority for the proposition that this Court's jurisdiction under 28 U.S.C. § 1257 is limited to cases with a written appellate opinion below.

III. Respondents' Argument Does Not Address The Issue Of An Illusory Substitute Remedy.

As noted above, respondents "restated" the questions presented for review by petitioner. (Supra, at 4-5). For some reason, respondents also chose to renumber the issues presented, so that their argument regarding Question 3 posed by petitioner appears as section 1 of their brief. Compare, Petition at 11-14, Respondents'

Brief at 2-6. Moreover, petitioners argument encompasses several sections of the Florida statute, while respondents' "restatement" focuses only on § 440.15, Florida Statutes. Compare, Petition at 11-13, Respondent's Brief at 2.

The entire thrust of petitioner's argument is summarized in one sentence at the end of that section:

> The remedy available under Florida's Workers Compensation Law is no longer a viable alternative to the common law tort remedy which has been taken away from worker `C'." (Petition at 13.)

Respondents' argument stresses a number of irrelevant points, including whether the Florida Legislature has constitutional authority to even create a workers compensation law (Respondents' Brief at 3) and whether a <u>fair tradeoff</u> of a meaningful administrative remedy for a similar tort remedy is constitutional. (<u>Id.</u>) Only once in five pages of argument do respondents touch upon the issue actually presented by petitioner, and then only to assert:

> As long as the workers' compensation laws remain a reasonable alternative to tort litigation, constitutional rights to equal access, equal protection and due process are not violated. (Cites omitted.) (Respondents' Brief at 5-6).

Agreed! That's exactly the issue for which review is sought. Whether the administrative remedy <u>remains</u> a "reasonable alternative," or has it been gutted, as a taxidermist might gut one of Florida's famous game fish for display; a beautiful, but empty, <u>illusion</u> of what was a living, viable entity.

In a final insult, respondents "restate" (and thereby gut) petitioner's argument by stating,

> Petitioner Gunter's arguments, however, attack the original basis for the creation of workers' compensation laws around the country.... (Emphasis added.) (Respondents' Brief at 6).

While petitioner respects the wide latitude traditionally permitted by this Court for the liberal and full development of ideas and concepts, it is respectfully suggested that respondents have crossed the line, repeatedly "restating" petitioner's actual position right out of the discussion.

IV. Respondents' Argument On Restriction of Medical Testimony Is Misplaced.

As noted above, respondents "restated" the questions presented for review by petitioner. (Supra, at 4-5). Respondents also chose to renumber the issues presented, so that their argument regarding Question 1 posed by petitioner appears as section 3 of their brief. Compare, Petition at 8-9, Respondents' Brief at 8-10.

Respondents appear to raise a "standing" issue by arguing that petitioner failed to comply with the very medical testimony statute which petitioner asserts is unconstitutional. (Respondents' Brief at 9). Of course, if petitioner had complied with the statute, and his proffered medical testimony had been admitted into evidence, respondents would argue that petitioner lacks standing because he suffered no detriment by the statute.

Respondents place reliance on Rucker v. City of Ocala, 684 So.2d 836 (Fla. 1st DCA 1996) to establish that the restriction of medical testimony does not violate petitioner's constitutional rights. (Respondents' Brief at 9-10. Even the hastiest reading of Rucker reveals that the Florida court applied only the loosest standards of the "rational basis" test to this statute. Id., 843. Where the injured worker's constitutional right of access to

courts for redress of grievances is juxtaposed against the profit margins of the insurance industry, it would appear the "strict scrutiny" test should have been applied. See, generally, Romer v. Evans, 517 U.S. 620 (1996), for explanation of equal protection review levels.

Respectfully submitted,

Douglas W. Abruzzo
Fla. Bar No 460028
Post Office Box 714
Gainesville, Fl 32602